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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM FIERRO,

Defendant and Appellant.

B255802

(Los Angeles County  
Super. Ct. No. BA417437)

APPEAL from a judgment of the Superior Court of Los Angeles County,

Henry J. Hall, Judge. Affirmed in part, reversed in part and remanded with directions.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Tita Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

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## **INTRODUCTION**

Defendant William Fierro appeals his conviction by a jury of one count of corporal injury to a cohabitant in violation of Penal Code section 273.5, subdivision (a). Defendant complains the trial court erred by denying his motion for discovery of information contained in police officer personnel files under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), and further asserts the court improperly denied his request to represent himself, made after the People rested, under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). With respect to defendant's *Pitchess* motion, we conclude the trial court erred and remand for further proceedings to determine whether the error was prejudicial. We find no abuse of discretion in the court's denial of defendant's *Faretta* request as that request was neither timely nor unequivocal.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. The Crime**

The incident at issue took place on Thanksgiving day, November 24, 2011. The victim, Janice Cooney, hosted a Thanksgiving dinner at her home that evening, attended by several friends as well as defendant (her live-in boyfriend) and Michael Calvillo.<sup>1</sup> Cooney and defendant had been drinking throughout the day and evening; Calvillo also drank heavily that evening.

After dinner, defendant went into the living room. When he discovered one of the guests lying on the couch, he screamed at him, “ ‘Get the fuck out of my house. Get off the couch, you fat fucker.’ ” Defendant then stomped on Cooney's coffee table and broke it into several pieces. When Cooney heard the ruckus, she went into the living room and told defendant to “knock it off,” and said she “would not tolerate such behavior in [her] house.” Afterward, Cooney turned and went to her bedroom, followed by defendant. Once in the bedroom, defendant grabbed Cooney by her arms and began to shake her. After a brief struggle, Cooney broke free, went into the bathroom and used her cell phone to call 9-1-1. Defendant left the house before police arrived.

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<sup>1</sup> Calvillo, who had known defendant since childhood, was residing temporarily with Cooney and defendant.

Officers Sanchez and Ortiz arrived at Cooney's home at approximately 10:15 p.m. Cooney met them outside, on the street. Cooney appeared to be intoxicated, but was not injured. The officers assured Cooney they would look for defendant and advised her to go inside her home and lock the door, which she did. Cooney also placed a padlock on the front gate to her property.

A short time later, Cooney heard the bells attached to her front gate sounding. She went outside and saw that defendant had forced his way through the front gate. As defendant approached the house, Cooney ran toward the front gate in an attempt to leave her property and run away from defendant. As Cooney passed by defendant, he grabbed her by the arm and pushed her to the ground. Cooney hit her elbow on the ground, injuring it. As Cooney stood up, defendant grabbed her by the jacket and then punched her twice in the face. Cooney broke free of defendant's grasp and ran toward the house, yelling for help. Defendant caught up with Cooney as she reached the front porch and placed her in a choke hold. Cooney was unable to breathe and feared for her life. At that point, Calvillo came out of the house and intervened. As Calvillo and defendant struggled, they fell off the porch and rolled into the nearby chain link fence.

Cooney called the police a second time and officers Ortiz and Sanchez arrived at her house at approximately 10:55 p.m. When the officers arrived, they saw Cooney was crying; her left cheek was red and beginning to swell. Photos taken at the hospital immediately after the incident, as well as photos taken several days later, showed Cooney suffered significant swelling and bruising around her left eye and on the left side of her face. Calvillo, who was with Cooney when the officers arrived, had a laceration on his right ring finger.

Initially, the officers did not see defendant. After searching the property, officers found defendant in Cooney's backyard. Defendant's face was bruised, he had small lacerations over each eye, and his eyes were nearly swollen shut. Defendant told the officers that Calvillo hit him in the face with a shovel. When asked, Calvillo denied using a shovel to attack defendant, and stated he only intervened after defendant hit Cooney in the face. Cooney said defendant had been waving the shovel around, but

dropped it when the police officers arrived. The officers arrested defendant, then sent Cooney, Calvillo and defendant to the hospital for medical treatment. A few days later, Cooney and Calvillo went to the police station and gave supplemental statements regarding the incident to Detective Vargas, the investigating officer.

2. *Prior Trial and Charges*

Defendant was tried by a jury in 2012. However, the jury was unable to reach a verdict and the case was set for retrial.

The information filed in connection with the retrial charged defendant with one count of inflicting corporal injury on a cohabitant in violation of Penal Code section 273.5, subdivision (a).<sup>2</sup> The information also alleged defendant suffered four prior convictions within the meaning of section 667.5, subdivision (b), and two prior serious or violent felonies for purposes of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Appellant entered a plea of not guilty.

3. *Pitchess Discovery Motion*

On December 3, 2013, several months before the scheduled retrial, defendant filed a *Pitchess* motion seeking information contained in the confidential personnel files of the two arresting officers, Sanchez and Ortiz, and the investigating officer, Detective Vargas. The motion generally alleged that all three of the police officers participated in fabricating and/or manipulating evidence related to the incident involving defendant and sought to discover any information relating to their propensity for dishonesty and false reporting. The court denied the motion without prejudice, stating that it found counsel’s declaration to be confusing as written.

4. *Faretta Request*

The jury trial began on March 19, 2014. The People offered the testimony of three witnesses: Cooney, the victim; Calvillo, the witness; and Ortiz, one of the arresting officers. On March 21, 2014, following the examination of these witnesses and the admission of documentary evidence, the People rested. Outside the presence of

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<sup>2</sup> All subsequent code section references are to the Penal Code.

the jury, the court then advised defendant of his right to testify on his own behalf. In the course of that colloquy, defendant made a request to represent himself, which the court denied as untimely.<sup>3</sup>

5. *Verdict and Sentence*

The jury convicted defendant as charged and found true the allegations regarding the defendant's prior convictions. The court imposed the mid-term base sentence of three years, which the court doubled under sections 667.5, subds. (b)-(i), and 1170.12, subds. (a)-(d), due to defendant's prior strike. The court also added four additional one year terms for the prior felonies, bring the total aggregate sentence to ten years, to be served in state prison.

Defendant timely appeals.

**CONTENTIONS**

Defendant contends the trial court erred by denying his *Pitchess* request for discovery of information contained in the arresting and investigating officers' personnel files and by denying his *Faretta* request to represent himself.

**DISCUSSION**

1. *The Trial Court Erred by Denying Defendant's Pitchess Motion*

Defendant contends the trial court erred by denying his discovery motion seeking information contained in the personnel files of the two arresting officers, Ortiz and Sanchez, and the investigating officer, Detective Vargas. We agree.

A. *Legal Principles*

The standard applicable to defendant's discover request is well settled: "Evidence Code sections 1043 and 1045, which codified our decision in *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 . . . , allow discovery of certain relevant information in peace officer personnel records on a showing of good cause. Discovery is a two-step process. First, defendant must file a motion supported by declarations

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<sup>3</sup> Defendant made several other requests to represent himself during the course of the proceedings below. However, defendant only challenges on appeal the court's ruling on his March 21, 2014 request.

showing good cause for discovery and materiality to the pending case. [Citation.] This court has held that the good cause requirement embodies a ‘relatively low threshold’ for discovery and the supporting declaration may include allegations based on ‘information and belief.’ [Citation.] Once the defense has established good cause, the court is required to conduct an in camera review of the records to determine what, if any, information should be disclosed to the defense. (Evid. Code, § 1045, subd. (b).) The statutory scheme balances two directly conflicting interests: the peace officer’s claim to confidentiality and the defendant’s compelling interest in all information pertinent to the defense. [Citation.]” (*People v. Samuels* (2005) 36 Cal.4th 96, 109.)

To establish good cause under Evidence Code section 1043, the defendant must present “a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025.) “[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Id.* at p. 1026.) We review the trial court’s denial of a motion to discover police personnel records for an abuse of discretion. (*Pitchess, supra*, 11 Cal.3d at p. 535.)

B.     *The Defendant Established Good Cause to Review the Officers’  
Personnel Files for Evidence of False Statements, Evidence  
Tampering and Retaliation*

Defendant’s *Pitchess* discovery motion sought evidence that the arresting officers, Ortiz and Sanchez, and the investigating officer, Detective Vargas, have a propensity for dishonesty and/or making false reports. As required, the motion set forth the defendant’s theory of the case: The defense claimed defendant was the true victim in the altercation, and that the officers were collaborating with Cooney (the alleged victim) and Calvillo (the alleged witness) to portray defendant as the aggressor. More particularly, according to the supporting affidavit, the defense planned to argue that Cooney and Calvillo “set him up.” The motion asserted defendant and Cooney had

a verbal dispute, and that Cooney was “trying to get rid of [defendant].” The affidavit stated that while defendant went out for a walk after the argument, “Cooney and Calvillo were lying-in-wait for him to return home.” When defendant returned from his walk, “Cooney popped him in the face. When he fell to the ground he was attacked by a waiting Calvillo.” The affidavit asserted the arresting officers falsified information in the arrest report and, along with Detective Vargas, subsequently tampered with photographic evidence. The defense also appeared to claim Ortiz and Sanchez testified falsely during the first preliminary hearing, the first trial, and/or the second preliminary hearing.

The trial court denied defendant’s motion without prejudice on the ground that the supporting affidavit “as drafted is fairly confusing.” The court described the deficiencies it observed in the declaration, noting it “weaves in and out of facts at the scene, testimony in the preliminary hearing, testimony from the previous trial. And I pieced together as well as I could what I believe the support was for the *Pitchess* motion. Notwithstanding all of that, and noting that [defense counsel] notes that there was some different testimony from the officers at the trial, but they freely admit, it, it’s not as if they’re trying to hide something or foster a falsehood or anything of the sort, they freely admit, yeah, that’s right it is different and let me explain to you why. So given everything before me and drawing on some of the well-known authorities in *Pitchess* law, I do not find a basis here for any *Pitchess* relief.”

Although we agree the supporting affidavit is not a model of clarity, particularly with respect to the alleged false testimony by the officers, it was nevertheless sufficient to establish good cause to conduct an in camera review of all three officers’ confidential personnel files. First, defendant alleged that all three officers (Ortiz, Sanchez and Vargas) tampered with the photographic evidence in this case. Defendant asserted Calvillo punched him numerous times in the face and was injured in the course of that conduct. Defendant further stated Sanchez “took 6 photos of victim, suspect, and witness injuries” at the scene, and the attached police report confirms that fact. The affidavit represented defendant saw Vargas give photos showing Calvillo’s injuries to

the prosecutor at the preliminary hearing, and that those photos subsequently “disappeared.” Defendant further alleged Cooney took additional pictures of her injuries some time later, and those photographs of her injuries were “substituted in with the knowledge and acquiescence of Vargas, Ortiz and Sanchez.” Given that defendant planned to argue Calvillo attacked him, and not the other way around, photographic evidence of injuries Calvillo sustained was directly relevant to the proffered defense. Further, the suggestion that Sanchez, Ortiz and Vargas participated in concealing and/or tampering with photographic evidence set forth a plausible scenario of police misconduct sufficient to establish good cause to review the officers’ files in camera. (See, e.g., *Warrick v. Superior Court*, *supra*, 35 Cal.4th at p. 1027 [allegation that officers planted evidence established good cause for *Pitchess* discovery, entitling defendant information relating to false arrests, planting evidence, fabricating police reports or probable cause, and committing perjury].)

Defendant also contended the two arresting officers (Ortiz and Sanchez) fabricated some aspects of the arrest report. Specifically, according to Ortiz’s arrest report, Cooney told officers defendant said to her, “Im [sic] going to kill you bitch.” In the supporting affidavit, the defense not only asserted defendant never made that statement, but also claimed Cooney never told the officers defendant made that statement. Defendant maintained the officers fabricated the statement in order to make him appear to be the aggressor rather than the victim. As for the officers’ motive, the affidavit attested that several months before the incident at issue, Ortiz and Sanchez “stopped [defendant] for no reason.” During the course of questioning defendant, Ortiz and Sanchez realized defendant previously made a report of police brutality against two other officers in their division. The defense hypothesized that the officers’ current campaign against defendant was responsive to, and in retaliation for, his accusation against their fellow officers. These assertions also established good cause to review the officers’ personnel files in camera. Evidence of threats made by defendant in the course of the altercation was directly relevant to the defense. Further, the assertion that the arresting officers fabricated the police report sets forth a relevant and plausible scenario



of police misconduct. (See, e.g., *People v. Hustead* (1999) 74 Cal.App.4th 410, 416-417 [remanding for *Pitchess* hearing where defendant established good cause by alleging police officer included false allegations in police report].)

C. *Conditional Remand Is Required*

Although we conclude the court erred by denying the *Pitchess* motion, the error does not require us to reverse the judgment at this stage. As explained in *People v. Gaines* (2009) 46 Cal.4th 172, 180, “the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand.” If the court determines the requested personnel records contain no relevant information, it is to reinstate the judgment. If the court determines discoverable information exists and should be disclosed, the court is to order disclosure of the information, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (*Id.* at pp. 181-183.)

2. *The Trial Court Properly Denied Defendant’s Faretta Request*

Defendant contends the trial court erred by denying his request to represent himself under *Faretta*, *supra*, 422 U.S. 806. We disagree.

“A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 20 (*Marshall*).)

“[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial.” (*People v.*

*Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*).) Accordingly, “when a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be.” (*Id.* at p. 128.)

“However, once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire *sua sponte* into the specific factors underlying the request . . . . Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.” (*Windham, supra*, 19 Cal.3d at p. 128.) “[A] reviewing court must give ‘considerable weight’ to the court’s exercise of discretion and must examine the total circumstances confronting the court when the decision is made.” (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353 (*Bradford*).)

We conclude the court properly denied defendant’s *Faretta* request because the request was neither timely nor unequivocal. As to timeliness, defendant made his *Faretta* request not only after trial began, but after the People rested. Accordingly, the court correctly determined that defendant’s *Faretta* request was not timely and he therefore failed to invoke the absolute right of self-representation. (See, e.g., *People v. Lynch* (2010) 50 Cal.4th 693, 722 [“[W]e have held on numerous occasions that *Faretta* motions made on the eve of trial are untimely”].) Accordingly, it was within the court’s discretion to grant or deny defendant’s request to represent himself.

As we shall explain, the court did not abuse its discretion for two independent reasons. First, defendant’s request to represent himself was not unequivocal. As our Supreme Court explained in *Marshall*, in determining whether a request for

self-representation is unequivocal, “the court’s duty goes beyond determining that some of defendant’s words amount to a motion for self-representation. The court should evaluate all of a defendant’s words and conduct to decide whether he or she truly wishes to give up the right to counsel and represent himself or herself and unequivocally has made that clear.” (*Marshall, supra*, 15 Cal.4th at pp. 25-26.) “Applying these principles, courts have concluded that under some circumstances, remarks facially resembling requests for self-representation were equivocal, insincere, or the transitory product of emotion.” (*People v. Tena* (2007) 156 Cal.App.4th 598, 607 (*Tena*).)

In *People v. Scott* (2001) 91 Cal.App.4th 1197 (*Scott*), for example, the defendant made a *Marsden* motion<sup>4</sup> four days before his trial was set to begin. After the trial court denied the motion, the defendant stated, “ ‘If that’s the case, I hereby move the court to let me go pro se.’ ” (*Id.* at pp. 1204-1205 & fn. 3.) When the trial court inquired further, the defendant repeatedly asserted he did not want the appointed counsel to represent him. He stated, “ ‘[I]f I can’t get a [new] state appointed attorney, then I[‘ll] represent myself,’ ” and “ ‘For the record, I don’t want this attorney representing me. You the court is [*sic*] coercing me.’ ” (*Id.* at p. 1205.) The court of appeal concluded the defendant’s remarks, taken in context, were too equivocal to constitute a proper *Faretta* request. (*Scott, supra*, 91 Cal.App.4th at p. 1206.) More particularly, the court surmised the defendant made the remarks out of frustration at the denial of his *Marsden* motion, rather than out of a true desire to proceed without counsel. (*Ibid.*)

Here, defendant’s request to represent himself appears to be an expression of frustration and anger over one of the court’s rulings. Specifically, after defense counsel indicated the defense would rest subject to the admission of exhibits, the court asked defendant outside the presence of the jury whether he planned to testify on his own

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<sup>4</sup> In *People v. Marsden* (1970) 2 Cal.3d 118, 123, our Supreme Court held that if a defendant seeks to have new counsel appointed, the trial court must inquire into the bases of the defendant’s dissatisfaction and exercise discretion in deciding whether to grant the defendant’s request.

behalf. In response, defendant asked the court whether the People would be permitted to use the fact of his prior conviction on a charge of domestic violence to impeach him if he testified. After the court ruled in favor of the People on that issue, defendant stated, “Wonderful guy. I’m not going to take the stand, but I want to go pro per now so I can cross-examine Ms. Cooney.” When the court refused, defendant stated, “I want to cross-examine Mr. Calvillo or Ortiz.”<sup>5</sup> In our view, and in light of all the circumstances surrounding the request for self-representation, defendant’s remarks appear to be a reaction to the court’s decision to allow the People to use his prior conviction for impeachment purposes, rather than an unequivocal expression of the desire for self-representation. Further, the fact that defendant brought, and the court denied, four *Marsden* motions during the preceding three days suggests defendant was again attempting to dispense with his current counsel, but did not desire to proceed without counsel altogether. (See *Scott, supra*, 91 Cal.App.4th at p. 1206 [*Faretta* motion properly denied where defendant’s request is reactive to frustration with counsel’s tactical decisions]; *Tena, supra*, 156 Cal.App.4th at pp. 608-609 [same].)

Second, even if we were to assume that defendant’s *Faretta* request was unequivocal, we would still conclude the court did not abuse its discretion based upon our analysis of the *Windham* factors and all the facts and circumstances present in this case. As an initial matter, defendant contends the trial court erred because it did not explicitly analyze the *Windham* factors before it denied his *Faretta* request. However, the court was not required to state its reasons for denying defendant’s motion on the record and we may affirm the court’s ruling so long as substantial evidence in the record supports the inference that the court had those factors in mind when it ruled. (See *Scott, supra*, 91 Cal.App.4th at p. 1206 [“[W]hile the trial court may not have explicitly considered each of the *Windham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors.”]; *People v. Perez* (1992)

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<sup>5</sup> The reporter’s transcript attributes this remark to defense counsel. However, given the context, we presume the transcript is in error and this remark was actually made by defendant.

4 Cal.App.4th 893, 904 [“While the court did not specifically make [a *Windham*] inquiry, we conclude there were sufficient reasons on the record for the court to exercise its discretion to deny the request.”].) In any event, the evidence indicates the court was guided by the *Windham* factors in this case.

As to the first two *Windham* factors, quality of representation by counsel and defendant’s propensity to replace counsel, defendant made it clear he was dissatisfied with defense counsel throughout the trial by making *Marsden* motions on a daily basis. The court concluded on each occasion that defense counsel was providing competent representation. Based upon our review of the trial transcript, we agree. Further, we have no doubt the court’s repeated assessment of defense counsel’s performance, as well as defendant’s unwavering desire to replace defense counsel because he would not accede to defendant’s trial strategy, informed its exercise of discretion regarding the *Faretta* request.

The final *Windham* factor—the likelihood of disruption or delay—also supports the court’s exercise of discretion in this case. Specifically, during each of the *Marsden* hearings, defendant refused to focus on the effectiveness of his counsel and instead focused on issues of trial strategy or on issues relating to his version of the facts of the case. Despite the court’s clear instructions that such tangents were inappropriate, defendant persisted with his approach. Thus, the court “could reasonably determine that notwithstanding appellant’s ability to speak cogently, he was likely to get sidetracked on tangential issues during closing argument and might use the argument as an opportunity to bring up matters that he felt had been neglected by counsel and that had not been placed in evidence.” (*Bradford, supra*, 187 Cal.App.4th at p. 1354 [finding no abuse of discretion where denial of *Faretta* motion based in part upon concern defendant would disrupt proceedings by his conduct if allowed to self-represent].) In addition, there was reason to believe defendant would not comply with procedural rules if he represented himself, given that he previously disrupted the proceedings by communicating directly with Cooney in court and spoke out inappropriately at several points during the trial, accusing both the prosecutor and Cooney of lying.

In light of all these facts and circumstances, the court did not abuse its discretion by denying defendant's request to represent himself during the final stage of the trial.

***DISPOSITION***

The judgment is reversed and remanded in part. The trial court is directed to conduct an in camera inspection of the personnel records of Sanchez, Ortiz and Vargas. If the court's inspection on remand reveals no relevant information, the court is directed to reinstate the judgment of conviction and sentence. If the inspection reveals relevant information, the court must order disclosure, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. In all other respects, the judgment is affirmed.

***NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS***

LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

JONES, J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.